Supreme Court, U. S.
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JAMES D. MAHER,
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Supreme Court of the United States

October Term 1919

No. 9[redacted]303 76

THE BANK OF JASPER,
a Corporation,
Petitioner,

VERSUS

THE FIRST NATIONAL BANK OF ROME,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

THE DREW PRESS, JACKSONVILLE 204726

In the Supreme Court of the United States

October Term 1919

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Bank of Jasper, a corporation, respectfully shows unto this Honorable Court as follows:

First: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

Second: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day of January A. D. 1913, by the respondent, The First National Bank of Rome, seeking to recover on certain certificates of deposit issued by your petitioner

(Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship, (Transcript, p. 3).

Third: Prior to the institution of this action in the United States District Court as aforesaid, on, to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by C. L. Adams, A. L. Wise, J. B. Wetherington, M. W. O'Cain, J. F. Thaggard, B. F. Carter, and C. W. Smith, in separate suits, against Rome Insurance Company, American Bank and Trust Company, The First National Bank of Rome, (respondent herein), and against your petitioner (Transcript pp. 12, 14, 16, 18, 20, 22 and 24); that in and by said bills of complaint it was prayed that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to American Bank and Trust Company or any one for it, (Transcript pp. 12, 14, 16, 18, 20, 22 and 24); that said certificates of deposit (Transcript pp. 9, 10 and 11), are in words and figures as follows, to-wit:

Certificate of Deposit.

No. 315

The Bank of Jasper.

$2,940.00
3,059.38

Jasper, Fla., Nov. 21st, 1911.

American Bank & Trust Co., Trustee, Rome, Ga., has deposited in this Bank Twenty-nine Hundred Forty & No/100 Dollars payable to the

order of itself with interest at rate of 4% compounded quarterly on the return of this Certificate properly endorsed. Not due until November 21st, 1912.

W. S. MURROW, Cashier.

Not subject to check.
Copy.

Certificate of Deposit.

No. 316.

The Bank of Jasper.

Jasper, Fla., Nov. 22, 1911

$441.00
458.00

American Bank & Trust Co., Trustee, of Rome, Ga., has deposited in this Bank Four Hundred Forty-one and NO/100 Dollars payable to the order of itself with interest at rate of 4% per annum compounded quarterly on the return of this Certificate properly endorsed. On or after November 22nd, 1912.

"W. S. MURROW, Cashier.

Not subject to check.
Copy."

"Certificate of Deposit.

"No. 317

"The Bank of Jasper

$1,470.00
1,529.69

Jasper, Fla., Nov. 23rd, 1911.

"American Bank & Trust Co., Trustee, of Rome, Ga., has deposited in this Bank Fourteen Hundred and Seventy and No/100 Dollars pay-

able to the order of itself with interest at 4% per annum compounded quarterly on the return of this Certificate properly endorsed on or after November 23rd, 1912.
Not subject to check.

"W. S. MURROW, Cashier.

"Copy.

"Certificate of Deposit.

"No. 318

"The Bank of Jasper

$735.00
764.84

Jasper, Fla., Nov. 23, 1911.

"American Bank & Trust Co., Trustee, of Rome, Ga., has deposited in this Bank Seven Hundred Thirty-five and No/100 Dollars payable to the order of itself with interest at the rate of 4% per annum compounded quarterly on the return of the Certificate properly endorsed on or after Nov. 23rd, 1912.

"W. S. MURROW, Cashier

"Not subject to check.
Copy.

"Certificate of Deposit.

No. 319.

"The Bank of Jasper

$1,558.20
1,621.46

Jasper, Fla., Nov. 25th, 1911.

"American Bank & Trust Co., Trustee of Rome, Ga., has deposited in this Bank Fifteen

Hundred Fifty-eight and 20/100 Dollars payable to the order of itself with interest at the rate of 4% per annum compounded quarterly on the return of this Certificate properly endorsed, on or after Nov. 25th, 1912.

W. S. MURROW, Cashier.

"Not subject to check.

Copy.

That in said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon The First National Bank of Rome, (the original plaintiff herein) by publication, under the provisions of Section 1866, General Statutes of Florida (Transcript pp. 27 to 63); that your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication by process, The First National Bank of Rome (original plaintiff here) filed special appearances and motions to quash the service, (Transcript pp. 27 to 63) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said The First National Bank of Rome. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions (Transcript p. 95).

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State courts, (Transcript p. 80), providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash services by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appearance by the appellant The First National Bank of Rome; and it was further provided in and by said stipulation (Transcript p. 80) that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company et als., (Transcript p. 121), in words and figures as follows, to-wit:

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs.
B. F. Carter, Appellee.
Hamilton County.

"Per CURIAM.

"This case cannot be distinguished from

that of Rome Insurance Company, vs. J. H. Corbett, this day decided, and upon the opinion therein, the order herein appealed from is affirmed.

"All Concur."

That the decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als. vs. J. H. Corbett, on the authority of which said case of Rome Insurance Company et. als. vs. B. F. Carter was decided, is in words and figures as follows: (Transcript pp. 122 and 123).

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs
J. H. Corbett, Appellee.
Hamilton County.

COCKRELL, J:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that County. Constructive service, in perfect accordance with the Statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that Court are depending.

"The Bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer v. Neff, 95 U. S., 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court and as has been said in Kilpatrick v. Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says: 'It was not intended, that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The Complainant is entitled to

have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the Court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter, The First National Bank of Rome took no further part in the proceedings in the State Court (Transcript pp. 27 to 63) and on the 14th day of July A. D. 1914, final decrees were entered in the state court (Transcript pp. 27 to 63), which decrees adjudged that the certificates of deposit therein mentioned, (*being the same certificates of deposit herein sued upon*) were void and of no effect and enjoining your petitioner from paying the proceeds thereof to The First National Bank of Rome, or to any one for it.

Fourth: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by the respondent herein, The First National Bank of Rome against your petitioner, your petitioner did file pleas of *res adjudicata*, (Transcript pp. 12 to 27), setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein

sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas (Transcript pp. 27 to 63).

Fifth: That on the 7th day of September, A. D. 1914 the plaintiff in the trial court, (the respondent here), filed a demurrer to said pleas, (Transcript pp. 61 to 63), which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, overruled, (Transcript p. 64).

Sixth: That thereafter, on the 15th day of June, A. D. 1915, said respondent filed replications to said pleas, (Transcript pp. 66 to 76), setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were actions *in personam;* that no personal service was ever had on said respondent; that it did not at any time or in any manner appear in said suits, except specially to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State Court over its person; there were attached to said replications copies of the records in the said Chancery suits mentioned, (Transcript pp. 77 to 147).

Seventh: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript pp. 147 and 148) and a demurrer, (Transcript pp. 148 to 149) to said replications which said motion and

demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications, (Transcript p. 155).

Eighth: That on the ninth day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 157). Thereupon, on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner. (Transcript pp. 158 and 159).

Ninth: That from said judgment, said plaintiff sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which Court on the 10th day of March, A. D. 1920, reversed the judgment of the District Court. (Transcript p. 187) holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of the respondent, The First National Bank of Rome, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by respondent to the Florida Supreme Court, did not amount to general appearances in the State of Florida, (which holding is in conflict with the decisions of the Supreme Court of Florida).

Tenth: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, and filed herewith and reference thereto is hereby made, all in compliance with Rule 37 of this Honorable Court.

Eleventh: Your petitioner is advised and believes that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being made final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

Twelfth: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als. v. B. F. Carter (63 Sou. 834; Transcript p. 121) and Rome Insurance Company et als. v. J. H. Corbett,

(63 Sou. 833; Transcript pp. 122 and 123) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas, the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon the respondent, The First National Bank of Rome, original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court.

Thirteenth: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its *situs* in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable ex-

cept "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over The First National Bank of Rome, such defects under the rulings of the Supreme Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon declared the certificates of deposit herein sued upon to be void and of no effect.

Fourteenth: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State court were actions *in personam* and that no

personal service was had on the plaintiff, one of the defendants in those proceedings.

Fifteenth: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit, in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of, and under the seal of, this Court, directed to the United States Circuit Court of Appeals, in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled "The First National Bank of Rome a corporation, plaintiff in error, versus The Bank of Jasper a corporation, defendant in error, Number 3431," to the end that the said case may be reviewed and determined by this Court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said povision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every

part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

I, F. P. Fleming, attorney and of counsel for petitioner, do hereby certify that in my opinion the foregoing petition is well founded in law and proper to be granted.

F. P. FLEMING.

In the Supreme Court of the United States

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME, a corporation,
Respondent.

BRIEF FOR PETITIONER.

The foregoing petition presents a clear case of conflict between a State Court and a United States Circuit Court of Appeals, and for that reason the writ of certiorari should be granted.

While we realize that the granting of such a writ is purely within the discretion of the Court and that such discretion is sparingly exercised, yet the fact that the decisions of a State and a Federal Court are in conflict *in the same controversy,* is considered sufficient grounds for the issuance of the writ.

Forsyth v. Hammond, 166 U. S., 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095.

In the case just cited it was said, referring to the power to issue writs of certiorari:

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the ques-

> tion involved, *the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state*, or some matter affecting the interests of this nation in its internal or external relations, *demands such exercise.*" (Italics ours).

In that case, as here, there existed a conflict between the decision of a Circuit Court of Appeals and the Supreme Court of a State. In that case, as here, the Circuit Court of Appeals reversed the lower court and sent the case back for further proceedings. It was argued that as the decision in the Circuit Court of Appeals was not final the petition for writ of certiorari was premature, but after referring to the conflict between the State and Federal Courts, it was said:

> "Although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The conflict in the present case is glaring. The Circuit Court of Appeals held that the appeals prosecuted in the suits in the State Court by the respondent, did not constitute general appearances. This was decided in the very face of the decision of the Florida Supreme Court in the very suit under consideration holding otherwise, and in the face of the established rule in Florida that an appeal constitutes a general appearance, notwithstanding that the appeal may have been for the sole purpose of testing the sufficiency of the service.

In its opinion, the Court of Appeals admitted the Florida rule (Transcript, page 181) but held that

in the proceedings in question, the rule did not operate because the appeals were not from *final*, but from interlocutory decrees.

But in those same proceedings, the Florida Supreme Court held that the appeals from the interlocutory decrees *did* constitute general appearances (Transcript p. 122). The only reason the Florida Court did not base its decision on that ground was because, as stated in the opinion (page 122) it was specially requested to pass on the merits so that many other cases pending in the lower court could thus be disposed of on its authority.

The conflict also appears in that the Florida Court held that the proceedings in the State Court were proceedings *in rem*, to the validity of which personal service was unnecessary, whereas the Court of Appeals held that the *same proceedings* were proceedings *in personam* to the validity of which personal service was essential.

We respectfully submit, that in deciding contrary to the holding of the Florida Supreme Court, the Circuit Court of Appeals committed error, because:

A. Federal Courts must recognize and apply rules of State Courts concerning matters of procedure.

B. In Florida, the prosecutions of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings *in rem*, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to be governed by their own rule of procedure, or by the general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the *lex fori*.

In York v. Texas, 137 U. S. 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case, as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the supreme court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

> Missouri etc. Ry. v. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. v. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman v. Wooters, 138 U. S. 287; 34 L. Ed. 962.

McLaughlin Brothers, v. Hallowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220.

In the last cited case it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. St. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty, or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption,

> whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas, 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. v. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

> "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a

judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall, 457, 21 L. Ed. 897. It is, however, the law of the state of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677), to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another state. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

B — IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Standley v. Arnow, 13 Fla. 361.

Henry v. Spitler, 67 Fla. 146, 64 So. 745.

Busard v. Hutson, 65 Fla. 479, 62 So. 483.

Barnick v. Rouse, 53 Fla. 643, 43 So. 753.

Hayman v. Neil, 53 Fla. 127, 44 So. 176.

Rumeli v. Tampa, 48 Fla. 112, 37 So. 563.

Wylly v. Sanford, L. & T. Co. 44 Fla. 818, 33 So. 453.

Schrader v. Schrader, 36 Fla. 502.

Rome Ins. Co. v. Corbett, Transcript herein p. 76.

The Circuit Court of Appeals in its decision (Transcript p. 181) stated that "The rule in Florida, differing from that which obtains in the Federal Courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals. And in the case of Rumeli v. Tampa, 48 Fla. 112, 37 So. 563, it appeared that the appeal was from an interlocutory appeal, the only decree mentioned in the opinion of the Court or the statement of facts being a decree pro confesso.

The Circuit Court of Appeals, having granted the correctness of the rule contended for, can not *assume* exceptions to it. The presumption is that the rule applies to all classes of appeals, unless proved otherwise.

West. Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220; 225.

Not only is there no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, or from interlocutory orders.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the state court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

> West Ind. Co. v. Rupp, 225 U. S. 261, 59 L. Ed. 220.
>
> Pennoyer v. Neff, 95 U. S. 732, 24 L. Ed. 522.
>
> York v. Texas, 137 U. S. 15, 34 L. Ed. 604.

Had no appeal been taken, the question could very well have been raised in this suit in the District Court. But having appealed, *voluntarily*, in the State Court,

respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and the justice of the rule is this: it prevents a defendant from doing what respondent has attempted to do in this case, that is, to secure, if possible, the benefit of a binding adjudication in its favor, *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. v. Rudd 235 U. S. 261, 59 L. Ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a thing, *a res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript p. 180). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 122).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely

determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript pp. 9, 10 and 11) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The fact that the certificates were in the State of Georgia is immaterial. They were merely the evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to respondent and by it endorsed to the petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be adminis-

tered through actions *in rem*. It is only on the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol v Brent, 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding *in rem;* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res*, sufficient to support a proceeding *in rem*.

This same principle is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the Court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against, the action is essentially a proceeding *in rem*. For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem*, the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held.*" (Italics ours.)

The above language is taken almost verbatim from the opinion of this Court in Wyman v. U. S. 109 U. S. 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank v. Bleeker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283:

> "This is a proceeding *in rem*. Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishees to the defendant."

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I. & P. R. Co. v. Sturm, 174 U. S. 810; 43 L. Ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the

same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, if cannot be contended that in the suits in the State courts there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent or any one for it.

The holding in C. R. I. & P. R. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

In Rothschild v. Knight, 184 U. S. 341, 46 L. Ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King v. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. Ed. 213, which held:

> "A garnishment of a resident debtor to reach a debt due to a non-resident defendant

> *who has no property subject to the jurisdiction of the Court*, does not deprive him of property without due process of law." (Italics ours.)

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript p. 180):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Florida. They in themselves constituted the *res*. But in addition, there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript, p. 185), the certificate of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to respondent. This is essentially the theory of garnishment. The situs of the debt being at the

home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but they partake of all the characteristics of, and are really, actions *in rem*.

> Pennoyer v. Neff 95 U. S. 714, 24 L. Ed. 565.
>
> Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 373.
>
> 1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D — THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 12 to 27). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 179 to 183); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 183 to 186).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeals decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the ques-

tion of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only power was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo*.

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam*, and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript p. 62) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed

the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote v. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance, and is not a compliance with the statute requiring the substantial matters of law intended to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 66 to 146) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it said:

> "Only objections or grounds of objection urged in the trial court will be considered on appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented*, were correct or not.." (Italics ours).

As this Court said in Robinson & Co. v. Belt, 187 U. S. 41, 47 L. Ed. 65:

"WHILE IT IS THE DUTY OF THIS COURT TO REVIEW THE ACTION OF SUBORDINATE COURTS, JUSTICE TO THOSE COURTS REQUIRES THAT THEIR ALLEGED ERRORS SHOULD BE CALLED DIRECTLY TO THEIR ATTENTION, AND THAT THEIR ACTION SHOULD NOT BE REVERSED UPON QUESTIONS WHICH THE ASTUTENESS OF COUNSEL IN THIS COURT HAS EVOLVED FROM THE RECORD. IT IS NOT THE PROVINCE OF THIS COURT TO TRY THESE CASES *DE NOVO*."

An examination of the transcript of the record in this cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 27 to 56) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company

had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees? It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees, if valid, and only asked the Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds — in other words the amounts of the certificates — to American Bank and Trust Company, *or to anyone for it,* (Transcript pp. 27 to 56). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect.* Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument — on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript p. 185). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudged the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts represented by the certificates consisted of the proceeds of the note, and if a part of the amount con-

sisted in other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript pp. 12 to 27) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript pp. 66 to 146) do not say that the certificates only partially cover the proceeds of the note. They are concerned only with the jurisdiction of the Court in entering the decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We respectfully submit that the writ of certiorari applied for should be issued in this instance. The record shows a plain case of conflict between a State and a Federal Court in reference to one and the same controversy.

The Circuit Court of Appeals, we contend, erred in deciding contrary to the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were proceedings *in rem* and jurisdiction over the person of the non-resident defendants was not necessary.

2. The State Court had jurisdiction over the persons of the non-residents by reason of their voluntarily availing themselves of the State Court's jurisdiction to prosecute appeals therein.

3. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

4. The effect of the decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

Respectfully submitted,

F. P. FLEMING,
Attorney and of Counsel for
Petitioner

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In The Supreme Court of the United States

October Term 1921

No. 76

THE BANK OF JASPER, a Corporation,
Petitioner,

VERSUS

THE FIRST NATIONAL BANK OF ROME,
a Corporation,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

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BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Respondent, which was the original plaintiff, instituted this suit against the Petitioner, which was the original defendant, in the United States District Court for the Southern District of Florida, on the 27th day of January, 1913, on five certificates

of deposit (numbered 315, 316, 317, 318 and 319) (Transcript, pp. 6-8) alleged to have been issued by Petitioner to the American Bank and Trust Company and subsequently endorsed to the Respondent. The jurisdiction of the trial court was based on diversity of citizenship. (Transcript, p. 3). A judgment was entered in the said District Court in favor of the Petitioner on the 9th day of January, 1919. From said judgment said Respondent sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which Court on the 10th day of March, 1920, reversed the judgment of the said District Court. From said judgment of said Circuit Court of Appeals, Petitioner sued out a Petition for Writ of Certiorari to this Honorable Court, which was granted on the 15th day of October, A. D. 1920.

Prior to the institution of this action in the United States District Court as aforesaid, on to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by C. L. Adams, A. L. Wise, J. B. Wetherington, M. W. O'Cain, J. T. Thaggard, B. F. Carter and C. W. Smith, in separate suits, against Rome Insurance Company, American Bank and Trust Company, The First National Bank of Rome, (Respondent herein), and against your petitioner (Transcript, pp. 9, 10, 12, 13, 14, 15 and 17), praying that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void; that the contracts of

sale of certain stock by reason of which said certificates were issued be decreed null and void and certain notes given by complainants to petitioner pursuant thereto, and the basis of said certificates, be cancelled and surrendered. (Transcript, pp. 9 to 15).

It was alleged in said bill of complaint that the said certificates of deposit were issued by the respondent based on certain notes issued by the complainants to the order of petitioner pursuant to a contract of sale of stock of the Rome Insurance Company; that said contract was fraudulent; and that the proceeds of said notes remained in the hands of petitioner (Transcript, pp. 7, 10, 35, 45).

In said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon The First National Bank of Rome, (the original plaintiff herein) by publication under the provisions of Section 1866 General Statutes of Florida, Section 3111, Revised General Statutes of Florida (year 1920) (Transcript, pp. 18 to 42). Your petitioner, a resident of the State of Florida, was personally served with process.

Upon the return day fixed in this order of publication The First National Bank of Rome, (original plaintiff here) filed special appearances and motions to quash the service (Transcript, pp. 62 and 70), which motions were in substance confined to the one ground that the proceedings brought in the State Court were actions in personam and that there had been no personal service on said The First National Bank of Rome. These motions having come on to be heard before the Circuit Court of

Hamilton County, Florida, said Court on the 14th day of March, and the 3rd day of April, 1913, denied said motions (Transcript, pp. 63 and 71).

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State Courts, (transcript, p. 54), providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als, which appeal was from orders of the State Court denying similar motions to quash service by publication on similar grounds, and it was further provided in and by said stipulations (Transcript, p. 54, 86, 89, 92, 95, 98) that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendant in those suits, and if the service in the said Carter case be ultimately held defective and ordered quashed then the service in the other cases shall be held defective and shall be quashed.

At the June term, 1913, of the Supreme Court of Florida, that Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company, et als., which decision is set forth in full (Transcript, p. 81). The service by publication was not held defective and was not quashed.

The decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als., vs. J. H. Corbett, a companion case, on the authority

of which, said case of Rome Insurance Company, et als., vs. B. F. Carter was decided, is set forth in full (Transcript, pp. 82 and 83).

Thereafter, The First National Bank of Rome took no further part in the proceedings in the State Court, (Transcript, pp. 18 to 42) and on the 14th day of July, 1914, final decrees were entered in the State Court (Transcript, pp. 18 to 42), which decrees adjudged that the certificates of deposit therein mentioned, (being the same certificates of deposit herein sued upon) were void and of no effect and enjoined your petitioner from paying the proceeds thereof to The First National Bank of Rome, or to anyone for it.

Following the decrees of the Circuit Court of Hamilton County, Florida, your petitioner filed pleas of res adjudicata, (Transcript, pp. 9 to 19) in this suit setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas, (Transcript, pp. 18 to 42). On page 15 of the Transcript the additional second plea is shown as being addressed to the "fourth" count of declaration; this is a typographical error, the word "fourth" should read "fifth."

To these additional pleas the plaintiff in the trial court (the respondent here), filed a demurrer (Transcript, pp. 42 to 43) which demurrer was overruled

(Transcript, p. 44). Thereupon respondent filed replications to said pleas, (Transcript, pp. 45 to 52), setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas (Transcript, pp. 9 to 18), were actions in personam; that no personal service was ever had on said respondent; that it did not at any time or in any manner appear in said suits, except specially to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State Court over its person. There were attached to said replications copies of the records in the said chancery suits mentioned (Transcript, pp. 52 to 99).

Petitioner filed a motion to strike (Transcript, p. 99) and a demurrer, (Transcript, pp. 99 and 100) to said replications. Subsequently respondent moved for leave to withdraw its replications and to file additional grounds of demurrer to the additional pleas and for a re-argument of the demurrer to the additional pleas. This motion was denied and petitioner's demurrer to the replications was sustained.

Thereupon, upon respondent's withdrawing all its pleas except the additional pleas setting up res adjudicata plaintiff in the trial court (the respondent here) filed a declination to plead further (Transcript, p. 105), and final judgment was entered in favor of your petitioner, (Transcript, pp. 106 and 107).

From said judgment, said plaintiff (the respondent here) sued out a writ of error to the Circuit Court of Appeals of the United States for the

Fifth Circuit which Court on the 10th day of March, 1920, reversed the judgment of the District Court, (Transcript, pp. 118 to 125) holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of the respondent, The First National Bank of Rome, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida acquired no jurisdiction over the fund or res sought to be impounded in said chancery suits, as the same was not under the control of the Court,

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said Court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecutions of the appeals by respondent to the Florida Supreme Court, did not amount to general appearances in the State of Florida.

SPECIFICATIONS OF ERROR

First: Your petitioner represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous in this: it presents a conflict of State and Federal jurisdiction and in effect reverses the decision of the Supreme Court of the State of Florida in the case of Rome Insurance

Company, et als., vs. B. F. Carter (63 Sou. 834; Transcript, p. 81) and Rome Insurance Company et als., vs. J. H. Corbett (63 Sou. 833; Transcript, pp. 82 and 83) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecution of the appeals in the State Court did not amount to general appearances, whereas, The Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service by publication upon the respondent, The First National Bank of Rome, original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the Court for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court. The Circuit Court of Appeals held the contrary.

Second: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its situs in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The situs of a debt for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings in rem, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over The First National Bank of Rome (the respondent here) such defects under the rulings of the Supreme Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon (Transcript, pp. 18 to 42) declared the certificates of deposit herein sued upon to be void and of no effect.

Third. Your petitioner further represents that no question was raised by the plaintiff, (the respondent here) either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of res adjudicata, except that the proceedings in the State Court were actions in personam and that no personal service was had on the plaintiff (the respondent here) one of the defendants in those proceedings. The Court of Appeals committed an error in considering and pass-

ing upon questions not raised in the trial court and not called directly to its attention.

Fourth. Your petitioner further represents that the said United States Court of Appeals for the Fifth Circuit, committed error in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that State and thereby assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

ARGUMENT

The petitioner in its argument expects to establish the following:

A. Federal Courts must recognize and apply rules of the State Courts concerning matters of procedure.

B. In Florida, the prosecution of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings in rem, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to

be governed by their own rule of procedure, or by general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the lex fori.

In York vs. Texas, 137 U. S., 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and the supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant in to court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the Supreme Court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

Missouri etc. Ry. vs. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. vs. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman vs. Wooters, 138 U. S., 287; 34 L. Ed. 962.

McLaughlin Brothers vs. Hollowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. vs. Rupp, 235 U. S. 261; 59 L. Ed. 220.

In the last case cited it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. Ct. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty, or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is in-

> stituted in a state court without service of process upon him may, if he please, ignore the proceedings as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. vs. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

> "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the

trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897. It is, however, the law of the State of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under Section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677) to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another State. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

On page 31 of respondent's brief in opposition to application for certiorari (filed October Term, 1920) is cited the case of Harkness vs. Hyde, 98 U. S. 476, 25 L. Ed. 237, as authority for the proposition that "Illegality in a proceeding by which juris-

diction is obtained is not waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

The case cited has no bearing on the points involved here. Petitioner is not arguing that the mere appearance for the purpose of objecting to the court's jurisdiction amounts to a general appearance. Our position is that the prosecution of the appeal amounted to such a participation in the proceedings as to amount to a general appearance.

Furthermore, the Harkness case does not touch upon the rule laid down in York vs. Texas, 137 U. S. 15, 34 L. Ed. 604, which admitted that the rule in the Federal Court was as stated in the Harkness case, but held that where the State Supreme Court had held certain acts to constitute a general appearance, the Federal Courts were bound to follow the rules of the State courts.

None of the cases cited in respondent's said brief (filed October Term, 1920) meet this proposition. We later cite cases in this brief to show that in Florida the undoubted rule is that an appeal amounts to a general appearance. This being a matter of procedure, the Federal courts must apply the same rule.

For the above reason, the following cases cited by respondent in its said brief at pages 20, 30 and 31, respectively, are absolutely not in point:

Davis vs. C. C. C. & St. L. R. Co., 217 U. S., 157, 54 L. Ed. 708.

Pugh vs. Loisel, 219 Fed. 417 (5th Cir. C. C. A.)

Smith vs. Gov. of Canal Zone, 249 Fed. 273, (5th Cir. C. C. A.)

In the matter of Indiana Transp. Co. 244 U. S. 456; 61 L. Ed. 1253.

All the Federal cases cited by respondent are cases in which the question of jurisdiction arose in the lower Federal Court. York vs. Texas, 137 U. S. 15, 34 1 Ed. 604, holds that regardless of the rule in Federal Courts, a rule of practice in a State Court will be followed by the Federal Court, as the State has full power over procedure in its courts, and further holds that a rule that a qualified appearance is a waiver of defects in jurisdiction is not a denial of due process of law.

B — IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Tunno and Jessup & Co. vs. Robert, 16 Fla. 738.

Stanley vs. Arnow, 13 Fla., 361.

Henry vs. Spitler, 67 Fla., 146, 64 So. 745.

Busard vs. Hutson, 65 Fla., 479, 62 So. 483.

Barnick vs. Rouse, 53 Fla., 643, 43 So. 753.

Hayman vs. Neil, 53 Fla., 127, 44 So. 176.

Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563.

Wylly vs. Sanford, L & T Co., 44 Fla., 818, 33 So. 453.

Schrader vs. Schrader, 36 Fla., 502.

Rome Ins. Co. vs. Corbett, Transcript herein, p. 82.

The Circuit Court of Appeals in its decision (Transcript, p. 121) stated that "The rule in Florida, differing from that which obtains in the Federal courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. The Florida Courts have always used the word "appeal" and have not limited it to the character of the appeal. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals.

In the case of Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563, it appeared that the error complained of was an interlocutory order, that of the entry of a decree pro confesso. The Supreme Court of Florida reversed the final decree on the ground that the entry of decree pro confesso was erroneous because the Court did not have jurisdiction of the defendant but held that by the appeal the defendant was then in Court. The sole contest was whether the Court had jurisdiction of the defendant, not on the merits, and it would be idle mockery to say to the defendant, you appealed from the final decree entered on a void decree pro confesso, assigning as error the entry of the interlocutory decree pro confesso and you are therefore in Court, but had you appealed from the decree pro confesso your appeal would not have constituted an appearance. The Court makes no such distinction.

In the case of Tunno and Jessup & Co. vs. Robert 16 Fla., 738, two appeals were presented by the appellants named from several interlocutory decrees and a final decree. There was no final decree against M. K. Jessup & Co. The Supreme Court of Florida at page 750 of text said:

> "We next treat the appeal of M. K. Jessup & Co. There is no decree in this record against these parties signed by the judge. There is an entry in the record ordering the bill to be taken for confessed signed by plaintiff's attorney. Anterior to this there is an affidavit by plaintiff's attorneys, that M. K. Jessup & Co. reside in New York, as shown by the return of the Sheriff, that they are not to be found in the county, and a suggestion that they reside in New York, and there is an order of publication by the judge. There is no evidence 'by affidavit to the judge' that any publication was ever made of this order. This is a requirement of the statute in order to perfect a constructive service in such cases, and it must appear in the record; nor is there any authority in such cases for an order taking the bill *pro confesso* to be entered by the plaintiff's attorney. It must be granted by the judge, (Thomp. Dig. 452). The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167.
>
> "The decrees of the 21st day of February A. D. 1877, and of the 16th day of July 1877,

> and the order taking the bill as confessed against M. K. Jessup & Co. are reversed and set aside, and the case is remanded for further proceedings conformable to law and not inconsistent with this opinion."

In the above case in the appeal of M. K. Jessup & Co., there is no decree in the record against these parties signed by the judge; there is no showing of proper service by publication on said parties; there is no order by the judge taking the bill pro confesso against said parties; there is no showing of any final decree or proper interlocutory decree against said parties. Yet the Florida Supreme Court in its opinion holds: (Ibid text 151)

> "The persons composing the firm of M. K. Jessup & Co. having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process."

In view of the facts in the above case and the opinion of the Supreme Court therein, such opinion clearly indicates that the prosecution of all classes of appeals to the Florida Supreme Court constitute general appearances on the return of the cause to the court from which it was appealed.

In the case of Standley vs. Arnow, 13 Fla., 386, it appeared that the defendant had moved in the lower court to set aside the report of the master for want

of notice of the hearing before him, and also to set aside the order Pro Confesso on the ground that she had a meritorious defense, and because no subpœna in said cause had been served upon her, which motion was overruled by the Court.

The Supreme Court of Florida held that the lower Court did not have jurisdiction of the defendant to enter a decree, and reversed the orders and decrees entered in the lower Court, but held:

> "The decree of the Circuit Court, and all other orders and proceedings therein subsequent to the return of the subpœna, must therefore be reversed, with costs; but as the appellant has made herself a party to the suit by voluntarily appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the Court in like manner as if she had been duly served with process."

The Supreme Court of Florida adopted in the case of Standley vs. Arnow, supra, the rule pursued by the Court of Appeals in Kentucky and the Supreme Court of Arkansas, saying:

> "This course has long been pursued by the Court of Appeals in Kentucky and the Supreme Court of Arkansas, and is adopted as a proper practice in like cases. *Vide* 1 Pike, 50, 376, 386, 405; 4 Bibb, 84, 167."

Almost similar language is used by the Supreme Court of Florida as by the Supreme Court of Arkansas. Neither makes any distinction as to the

character of the appeal, but holds that such appeal is voluntary.

In the case of Gilbreath vs. Kuykendall, 1 Pike, 50, it appeared that the writ was issued in the name of the United States and not of the State of Arkansas. The process was held void, but the Court in its opinion said:

> "But as the plaintiff in error has now made himself a party to the suit by voluntarily appearing and prosecuting his writ of error, according to the rule of practice in similar cases by the Court of Appeals of Kentucky, in which we fully concur, he must, upon return of the case to the court below, be considered as regularly before the Court in like manner as if he had been duly served with process."

In the case of Murphy vs. Williams, 1 Pike, 276, it appeared that the writ was returnable to the 1838 Term, while default was entered at the 1837 Term. The default was held error, but the Court at page 385 said:

> "But as the appellant has appeared here and assigned his errors, he has become a party to the proceedings and consequently Murphy, in accordance with the rule laid down in Gilbreath vs. Kuyendall, is bound to appear in the Circuit Court when the same proceedings will be had in this suit, as though he was served with a valid process."

In the case of Graves vs. Hughes, 4 Bibb 84, the Court found that Graves had not been served with process, but that service was made on another per-

son by the name of Graves, and held that jurisdiction was not acquired to enter default. The Court said:

> "The decree as to Graves is therefore erroneous and must be reversed, the cause remanded to the court below and the order taking the bill as confessed against Graves set aside, and he may have leave to answer the bill should he apply for leave to do so; but if he should not apply for leave to answer, then, as by the laws now in force, a copy of the bill need not be delivered, and as he has appeared to the cause an order again may be entered taking the bill as confessed."

Judgment by default in ejectment upon void service, was reversed in the case of Wharton vs. Clay, 4 Bibb 167, but the appeal was also held to constitute an appearance, the Court saying:

> "The judgment must therefore be reversed with costs, and the cause remanded to the Court for new proceedings, but as the tenants in possession appear now to have notice of the pending of suit, unless they should appear and plead, judgment by default may be entered."

The rule announced in Standley vs. Arnow has been adhered to by the Supreme Court of Florida.

In Shrader vs. Shrader, 36 Fla., 502, on page 518, the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. Standley vs. Arnow, 13 Fla., 361."

In Wylly vs. Sanford Loan & Trust Co., 44 Fla., 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. Standley vs. Arnow, and Finlayson vs. Lipscomb, supra."

In Rumeli vs. City of Tampa, 48 Fla., 112, on page 114, the Court says:

> "The appeal of the defendant, Rumeli, operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. Wylly vs. Sanford Loan & Trust Co., 44 Fla. 818."

In the case of West Ind. Co. vs. Rupp., 235 U. S., 261, 59 L. ed. 220, at page 225 of the text, the Court said:

> "It does not appear that the Court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed, any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as matter of fact. We are referred to no authoritative judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review; and this applies where foreign law is in question in the state court as well as to any other issue of fact. Janley v. Donoghue, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242; Chicago & A. R. Co.

v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398."

The above is similar to the case presented by the record herein; it does not appear that any Florida decision was called to the attention of the Circuit Court of Appeals, and said court cites no Florida decision, holding that an appeal from an interlocutory order of the court does not constitute a general appearance, as distinguished from an appeal from a final decree.

There is no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, on the merits as well as jurisdictional questions.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the State court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored

the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

West Ind. Co. vs. Rupp, 225 U. S., 261, 59 L. ed. 220.

Pennoyer vs. Neff, 95 U. S., 732, 24 L. ed. 522.

York vs. Texas, 137 U. S. 15, 34 L. ed., 604.

The word "voluntary" has been defined by the Courts as, "done by design or intention; purposely; intentional; not accidental."

Williams vs. United States Mutual Association, 31 N. Y. Supp. 343, 346; 82 Hun. 268.

Travelers' Ins. Co. vs. Randolph, 78 Fed. 754, 762; 24 C. C. A. 305.

Campbell vs. Fidelity & Casualty Co., 60 S. W. 492, 495; 109 Ky. 661.

The respondent in support of its construction of the word "voluntary" has cited in previous briefs the cases of Craighead vs. Martin, 25 Minn., 41; Freer vs. White, 41 Mich., 74, 51 N. W. 807; and Pugh vs. Loisel, 219 Fed., 417, 424; to the effect that the effect of appearing to contest jurisdiction cannot be regarded as a voluntary appearance in the cause. This rule is true in Florida in so far as the original Court is concerned and is so specifically held in the

case of Standley vs. Arnow, supra, where the Florida Supreme Court, speaking of the proceedings in the lower Court, stated:

> "But where a party appears and questions the jurisdiction by motion based upon an alleged defect of jurisdiction, it would be a violent presumption to say that he consents by objecting."

Yet, we have seen that the Supreme Court of Florida in that very case held that the taking of an appeal to the Supreme Court did constitute an appearance. Thus, the Court showed the distinction between the two proceedings, that of objecting to the jurisdiction in the lower Court and that of taking an appeal to the Supreme Court, and showed the different rules applying to the different proceedings, establishing conclusively that the prosecution of an appeal was a voluntary action constituting an appearance.

The appeal was voluntary. There was no process compelling appearance. There is no substantial difference between the instant case and the other cases decided by the Supreme Court of Florida.

Had no appeal been taken, the question could very well have been raised in this suit in the District Court. But having appealed, *voluntarily*, in the State Court, respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and justice of the rule is this: it prevents a defendant from doing what respondent has

attempted to do in this case, that is, secure, if possible, the benefit of a binding adjudication in its favor *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. vs. Rupp, 235 U. S. 261, 59 L. ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

In the case of the Chicago Life Insurance Co. vs. Cherry, 244, U. S. 25-30, 61 L. ed. 966 (decided May 7th, 1917) at page 969, in its opinion the court says:

> "But when the power of the court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. York v. Texas 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9, Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 272, 273, 59 L. Ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a

court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law. Pennsylvania F. Ins. v. Gold Issue Min. & Mill Co. 243 U. S. 93, 96, ante, 610, 37 Sup. Ct. Rep. 344. Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. Ed. 184, 25 Sup. Ct. Rep. 70."

In the case of Forsyth vs. Hammond, 166 U. S., 506-520, 41 L. Ed. 1095-1100, we quote: Headnote No. 5:

"5. One who has voluntarily sought the judgment of the supreme court of a state to declare that a decree of a lower court was not only erroneous but void, although not a volun-

> tary litigant in the trial court, is bound by the judgment of the supreme court as res judicata, and cannot attack it collaterally in a circuit court of the United States."

In said case at page 1100, in its opinion the Court says:

> "The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a

thing, a *res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript, p. 121). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 82).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript, pp. 6, 7 and 8) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The

fact that the certificates were in the State of Georgia is immaterial. They were merely evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be administered through actions *in rem*. It is only the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol vs. Brent, 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible such as a debt, is essentially a proceeding *in rem;* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res,* sufficient to support a proceeding *in rem.*

The same principal is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against the action is essentially a proceeding *in rem.* For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem,* the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held."* (Italics ours).

The above language is taken almost verbatim from the opinion of this court in Wyman vs. U. S. 109, 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank. vs. Bleeker, 72 Minn., 383, 75 N. W., 740, 42 L. R. A. 283:

> "This is a proceeding *in rem.* Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishee to the defendant."

The Supreme Court of the United States has passed on the questions as here involved in the case of Goodman vs. Niblack, 102 U. S. 556, 26 L. Ed. 229, decided subsequent to Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 572. In the Goodman case the defendant, Niblack, as administrator of an estate, had in his hands One Hundred and Fifty Thousand Dollars, ($150,000.00). The plaintiff had a judgment against the decedent for Thirty-one Thousand Three Hundred and Forty-four Dollars and forty-four cents ($31,344.44). A bill in chancery was brought to subject the funds in the hands of the administrator to the payment of the judgment, it being claimed that the money was a trust fund, devoted by the decedent to the payment of the judgment. The Court, in referring to the possible inability to obtain service on the trustees of the money, held that service by publication would bind them in so far as the decree entered affected the funds in the hands of the administrator, Niblack. It was said:

> "This is a proceeding in equity to force a lien on the fund which is within reach of the court, and as the trustees and complainant have

the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and that is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant."

The situation here is very similar. Instead of an administrator having custody of the funds in question, we have a Bank in possession of the money. In each case, a trust is sought to be impressed on the funds for the benefit of the complainant. In each case the money is in the jurisdiction of the court, and the custodian of the money is before the court, personally served. No fundamental distinction can be observed, and the decision in the Goodman case, holding that the decree, insofar as it affected the funds, would be binding as to interested parties served by publication only, must be adhered to as controlling.

In Gamble vs. Dawson, 67 Washington, 72; 120 Pac. 1060; Ann. Cases 1913 D-501, an action in equity was brought against a resident corporation to have five thousand (5,000) of its shares of stock held by a non-resident defendant decreed to be the property of the complainants; to have such shares cancelled, and new ones issued to complainants; and to restrain the defendant corporation from transferring such shares of stock to any one but the complainants. It was held that the certificates of stock

were mere *evidences* of property; that the property represented by such shares of stock was in the corporation which was in the jurisdiction of the court; that the court had jurisdiction, accordingly, over such property and its decree adjudicating the title thereto was valid.

To the same effect is Jellenik vs. Huron Copper Mining Company, 177 U. S. 1, 44 L. Ed. 647, which, as the court said in its opinion, was for the purpose of removing an incumbrance, or cloud on the title to certain shares of stock of a resident corporation. The shares were owned by non-resident defendants who were served by publication only. The opinion is devoted mainly to the consideration of the question of whether the situs of the shares of stock was the residence of the corporation or the residence of the owner of the shares. It was held that the situs was the residence of the corporation, the corporation property being the property represented by the shares and certificates. Arriving at this conclusion, the court, without further discussion held that the court having jurisdiction over the property of the corporation could adjudicate the title to the shares of stock of the corporation.

That case is closely analogous to the instant case. In the suit referred to in defendant's (petitioner here) plea, (Transcript, p. 9) the property in question was in the jurisdiction of the court, although the certificate of deposit, or promise to pay over that property, which certificate of deposit was at most mere *evidence* of the money itself, was in another State. Under the holding in the Jellenik case,

it was proper for the court to adjudicate and determine the title to the deposit, although the holder of the certificate was a non-resident and served by publication only.

In the case of Quarl vs. Abbett, 102 Ind. 233, 52 Am. Rep. 662, the essential facts were similar to those here involved. That was a suit against two non-resident defendants to declare void as fraudulent a transfer between them of certain shares of stock in a resident corporation. The property concerned, that of the corporation, was in the court's jurisdiction. Service on the non-residents was had by publication. It was held that the judgment setting aside the transfer as fraudulent and subjecting it to the payment of complainant's demand, was valid, though based on constructive service of process on the non-resident claimants to the stock. We quote from the opinion:

> "It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. 'If a foreigner or citizen of another State,' says an able court, 'send his property within a jurisdiction different from where he resides he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate.' Clark v. Tarbell, 58 N. H. 88. This general doctrine has been declared by other courts, among them our own. Ames Iron Works v. Warren, 76 Ind. 512; Green v. Can. Buskirt, 7 Wall. 139; Rice v. Curtis, 32 Vt. 460.

It is upon this general principle that our statutory provisions relative to notice by publication are founded. If property of a non-resident cannot be reached by legal process upon constructive notice, then our statutes were passed in vain, and are mere empty legislative declaration, without either force or meaning; for if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment cannot operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the court would be powerless to assist a citizen against a non-resident. Such a result would be a deplorable one. If the rule were that which appellant's argument asserts, a citizen with a chattel mortgage could not enforce it on property within our borders against a non-resident, nor could a creditor enforce a lien against a man who had fled to Canada and made it his residence, although he had abundance of property within the State. Nor if the rule were as asserted, could property of a non-resident corporation within our limits be reached. But the rule is not as contended for; property within our jurisdiction may be seized upon process issued upon constructive notice. This has been often decided with respect to attachment proceedings. Jude Story says: 'Sometimes seizure or attachment is purely nominal, as for example of a chip, or a cane, or a hat. In other cases the seizure or attachment is bona fide of real property or personal property within the territory or of debts due to the non-resident persons in the hands of their debtors who live within the country. In such cases, for all purposes of the suit, the ex-

istence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment.' Story Conf. Laws, para. 549. Wharton says: 'But when the thing is situate within the jurisdiction of the court, then proceedings in rem give a title to it against all the world.' Wharton Conf. Laws, para. 829. He applies this doctrine to the seizure of goods under a writ of attachment, and cites Ewer v. Coffin, 1 Cush. 23; Phelps v. Holker, 1 Dall. 261; Pawling v. Bird, 13 Johns 192; Arndt v. Arndt, 15 Ohio 33; McVicker v. Beedy, 31 Maine 314; Bissell v. Briggs, 9 Mass. 462.

"It is said by appellant's counsel that fraud is a question of fact, and therefore that such a question cannot be tried upon constructive notice. This position is not tenable. Any question affecting the status of the specific property within the jurisdiction of the court and the rights of the parties in the property may be tried. The purpose of notice by publication is to give the best notice practicable to non-resident defendants, and thus enable the court to fully decide the controversy respecting property within its jurisdiction, no matter what form the question may assume. If this be not true, then in attachment proceedings fraud could never be shown where non-residents were parties, and that this cannot be true is too clear to admit of debate.

"The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. The principle is an ancient one, and even in

the time when the contest between the chancery courts and the common law courts was hot and angry, it was recognized and enforced. Where the jurisdiction of the court once attaches it extends over the whole case, and the court will determine all questions necessary to a full adjudication of the controversy. Field v. Holzman, 93 Ind. 205; Carmichael v. Adams, 91 Ind. 526; 1 Pom. Eq. Jur. para. 231. The authority to determine whether property is subject to a lien, or liable to be seized under a writ of attachment, or liable to be applied to the payment of the claims of creditors, necessarily confers jurisdiction to determine the amount of indebtedness, for in almost every case the court must ascertain the indebtedness. Thus in an action to foreclose a mortgage, the court must ascertain the amount of the indebtedness, so in an action to enforce a claim against property fraudulently conveyed the amount of the debt must be ascertained, and so in attachment proceedings, the amount of the indebtedness must be ascertained in order to make the proper order for the sale of the attached property. In such cases the court in ascertaining the amount due does not proceed against the person but simply ascertains the amount that shall be adjudged a lien on the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and the decree of the court in such cases is not a personal judgment, but is a mere statement of a finding upon one of the questions in the case."

A case which cannot be distinguished from the one before this Honorable Court, is Loaiza vs. Su-

perior Court for San Francisco, 85 Cal. 11, 9 L. R. A. 376. There, some real property situated in Mexico had been sold to the complainants, through false and fraudulent representations of the vendors who lived in Mexico. When the property was purchased, the complainants delivered certain moneys and securities to a stakeholder in California. The property sold was in Mexico, and the defendant vendors were in Mexico. Suit was brought in California, the residence of the stakeholder, and where were located the funds sought to be impressed with trust in favor of the complainant. Service on the non-resident defendants, for whose benefit the stakeholder was holding the funds, was had by publication. It was held that as the property, title to which was to be adjudicated, was within the court's jurisdiction, judgment could be validly entered disposing of the property upon service by process by publication only on the non-resident claimants. In both that case and the instant case, personal property was involved. In both cases the property and the stakeholder were in the territorial jurisdiction of the court. In both cases the property concerned consisted of the purchase price for property sold through fraud. In both cases the defendants to whom the funds in question were payable, were non-residents, served by publication only. In both cases the relief sought was the same.

It was contended, in the Loaiza case, that because the defendants were non-residents, and not personally served, the court had no jurisdiction. In the course of the opinion, the California Court

points out the error into which counsel for the non-resident defendants had fallen in the application of the case of Hart vs. Sansom, 110 U. S. 115; Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 572, and other cases relied on, and says: "But all this argument is based upon a misapprehension of the character and object of the action here under discussion and of the relation of the parties to each other at the commencement of the action." After reviewing a number of decisions of the United States Supreme Court, the opinion concludes:

> "Even in the case of Arndt v. Griggs, 134 U. S. 316 (33 L. ed. 918), cited by petitioner, the court says: 'It (the state court) cannot bring the person of a non-resident within its limits,—its process goes not out beyond its borders * but it may determine the extent of his title to real estate within its limits and for the purpose of such determination may provide any reasonable method of imparting notice.'
>
> "If the State Court had such power with reference to title to real estate held by a non-resident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purposes of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud. Our Statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the

person who would otherwise have had it. Civil Code, para. 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee,— he who has become trustee by fraud,— by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded cestui que trust. That the court has such jurisdiction as is here claimed for it is fully sustained in Felch v. Hooper, 119 Mass. 52, where the case is clearly distinguished from that of Spurr v. Scoville, 57 Mass. 579, cited by petitioner; in National Exch. Bank v. Sterling, 31 S. C. 360; Quarl v. Abbott, 102 Ind. 233; in King v. Vance, 46 Ind. 251, where the court says: 'The defendant may be brought in by publication, and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment;' and in Martin v. Pond, 30 Fed. Rep. 15, where Mr. Justice Brewer says: 'It may be conceded that notice to the defendant is necessary to divest him of his rights and interest. But the publication is notice — it is equivalent to the personal service of summons.' "

Now in the proceedings relied on in defendant's additional pleas, (petitioner here), (Transcript, p. 9), the primary object of the suit was to determine the right of such non-resident defendants to a fund or deposit within the jurisdiction of the State Court, which fund or deposit, was created by such defendants by fraud, as the court held. Can it be declared to be the law that a person can come into the State of Florida, obtain money, or other personal property

through fraud, leave the property within the State and within the jurisdiction of the State courts, go to a distant State, and be immune against any action in a court of equity to have his pretended ownership of the property adjudicated by the forum in which the property is situate and in which the fraud was perpetrated? Are State courts to be held powerless to protect their citizens in such circumstances? Is it to be said that citizens can be defrauded of their property, and that the courts must sit idly by, with that property in plain view, and within their reach, impotent to make restitution, because those who committed the fraud have stepped over the border line of the State? Such is not, never has and never could be, the law. With the property in its jurisdiction, the court by giving statutory notice, as was done here, can adjudicate title to the property and restore it to the proper owner, although of course its decrees can have no personal effect on the absent parties not personally served. Such is the law as stated in the cases heretofore cited in this brief, and such is the law if reasoned out on the basis of justice, practicability and common sense.

The principle that a court may adjudicate the title to personal property within its jurisdiction, although the owners or claimants of such property are nonresidents and not personally served, has time and again been recognized and applied by the Supreme Court of the United States.

Chicago etc. R. R. v. Sturm, 174 U. S. 710, 43 L. ed. 1144.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023.

N. Y. L. Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. ed. 1140.

L. & N. R. R. v. Deer, 200 U. S. 176, 50 L. ed. 426.

B. & O. R. R. v. Hostetter, 240 U. S. 620, 60 L. ed. 829.

Amparo Mining Company vs. Fidelity Trust Company (N. J.) 71 At. 605, was an action in equity, brought in New Jersey by a New Jersey corporation, against a Pennsylvania corporation which was served by publication only. The object of the bill was to establish title to 549,504 shares of stock belonging to the complainant, which the defendant claimed to own. The bill alleged that the defendant acquired the stock under such circumstances that it must be deemed to hold them in trust for the complainant. It was held that as the *res*, the stock, was in the court's jurisdiction, it could proceed to establish title thereto, notwithstanding the fact that the defendant owner thereof was a non-resident and not personally served. The opinion is exhaustive and instructive, reviewing thoroughly the authorities in point, and answering in detail all the possible objections that might be raised against the holding. The court stated that:

> "The authorities which control this court, indicate, I think, the following as the essential elements of an action quasi in rem: (1) A res located within the territorial limits of the

state in such a way that the state can, if it see fit to do so, exercise absolute power to control and dispose of it; (2) a course of judicial procedure, the object and result of which are to subject the res to the power of the state directly by the judgment or decree which is entered, as distinguished from a course of procedure which only affects or disposes of the res by compelling a party to the action to control or dispose of the res, in accordance with the mandate of the judgment or decree; (3) a course of judicial procedure on its face directed specifically toward the res so as to disclose this res to the defendant when reasonably notified of the action."

Then, after an interesting discussion too lengthy to be reproduced in this brief, the court continues:

"In supporting the proposition that the present suit is strictly a suit in personam the brief for the defendant alleges 'that the object of the suit is to obtain relief which could only be decreed in personam' and points out that 'the prayer is specifically limited to a decree directing the defendant to transfer the shares of stock in question' and that 'the operation of the decree would be purely against the person of the defendant.' In support of these views it is alleged that 'the case differs from those in which decrees are sought to compel the conveyance of lands' in which cases by statute the 'decree if not complied with by the defendant can operate itself as a conveyance' and it is insisted that 'no similar provision is made for the transfer of property purely personal' such as the shares of stock in question. This argu-

ment seems to rest upon a mistaken view of the nature of the case set forth in the complainant's bill and of the relief therein prayed for, as well as an inadequate view of the power of the Court of Chancery to enforce its decrees affecting personal property which it can sieze and control. The allegations of the bill show that the stock in litigation is charged with a trust for the complainant's benefit, and that the complainant is the equitable owner of this stock, and that the defendant, as executor, etc., has no estate or interest therein, excepting so far as the same stands as security for the sum of $40,000. The prayer of the bill is that the rights under the trust above mentioned may be established by the decree of the court, as well as that the defendant may be decreed to assign and transfer the said shares of stock to the complainant upon payment of the said sum of $40,000 with the interest thereon. Of course, it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and if such relief is the whole relief prayed for, the action, as we have seen, may be strictly in personam. In the present case, while the bill prays that the defendant may be decreed to assign and transfer the shares of stock in dispute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust, a trust in respect to a res, situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall ob-

tain a decree in this case establishing its rights in respect of the res, and then shall desire to secure the surrender of the outstanding certificates representing the res, it may be obliged to bring a suit in the State of Pennsylvania in order to secure such a surrender. A similar situation would exist if the defendant were a natural person resident in New Jersey who had been duly served with process in New Jersey, but who had gone out of the State, carrying with him the certificates representing the stock which was the subject-matter of the litigation. In such a case, however, the decree would be enforceable in personam, whenever the defendant could be seized within the state of New Jersey."

The opinion concludes in the following language:

"My conclusion is, that the present action has all the essential characteristics of an action *quasi in rem*, and that the defendant, having been duly notified of the suit so as to give it ample opportunity to appear and make defense therein, will, if it refrains from appearing, be bound by the decree so far as the same relates to the status of the res, and that in such case the defendant cannot maintain that it is deprived of property without due process of law."

The foregoing decision was affirmed by the New Jersey Court of Errors and Appeals, 73 Atl. 249.

In Gassert vs. Strong (Mont.) 98 Pac. 497, the question raised by this writ of error was squarely before the court. It was there expressly stated that an action to establish and enforce a trust in personal property fraudulently obtained is an action *in rem*.

and even though the defendants holding the legal title are non-residents and served by publication only, yet the court has jurisdiction to declare and enforce a trust against them because the subject matter of the trust is within the territorial jurisdiction of the court. The opinion, after pointing out that the fact that the action was in form against the non-resident defendants personally was immaterial, and after reviewing the decisions of the United States Supreme Court already presented in this brief, said:

> "It has been quite generally held that an action to establish and enforce a trust in real estate is a proceeding quasi in rem (Porter Land & Water Co. v. Baskin (C.C.), 43 Fed. 323; Reeves, v. Pierce, 64 Kan. 502, 67 Pac. 1108), and that 'the courts of the state where the trust property is situate have jurisdiction over the enforcement and administration of the trust so far as the property within their jurisdiction is concerned.' 22 Ency. Pl. & Pr. 21. And, again, it is said that a court having jurisdiction of a trust estate does not lose it by reason of the trustee's absence from the state. Pennington v. Smith (C. C.) 69 Fed. 188."

Then after quoting from Loaiza vs. Superior Court (Cal.) 9 L. R. A. 376, quoted supra, the Court continued:

> "From the facts stated in the complaint in this action, it appears that these 5,000 shares of stock are charged with a trust, and it cannot be urged that our courts are powerless to enforce such trust, merely because one of the parties holding the legal title thereto is beyond

the reach of the process of such courts. We think it sufficient to give the court jurisdiction that either the party or the subject-matter of the trust is within the reach of the court. And this appears to be the holding of the courts, Felch v. Hooper, 119 Mass. 52.

"To what class of actions, then did section 610 above, before the amendment of 1907 apply? In the language of the Supreme Court, in Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, we think 'it applies to all cases where under recognized principles of law suits may be instituted against non-resident defendants.' That it was so intended we think is obvious from the general terms in which the section is couched; and, so far as we know the only exception which can be made from the operation of its provisions is in actions in personam, strictly speaking. We are of the opinion that the present action is not such a one, but that it falls within the definition of a proceeding quasi in rem, and that substituted services upon L. M. Strong was sufficient to enable the district court to determine the relative rights of the parties to the stock in question, even though it would not be sufficient to warrant a personal judgment against L. M. Strong himself."

Cases to the same effect might be cited ad infinitum but we have already presented sufficient to reveal the unanimity of judicial opinion on the points in question. It cannot possibly, in view of the many cases cited supra, be contended that the proceedings in the State court were not proceedings *in rem*. The fact that the certificates of deposit were

in Georgia is immaterial. They were mere evidences of the deposits, which were in the Jasper Bank. These deposits consisted, it appears from the copies of the bills of complaint attached to the replications (Transcript, pp. 55 to 61, and 64 to 70), of the proceeds of promissory notes given by the complainants in those suits to the respondent here, and by it delivered to the Jasper Bank, this petitioner. The notes were at all times outstanding and constituted the *res* which was the subject matter of the suits in the State court. And even if we disregard the presence of the notes, and consider the case as merely one of a general deposit, evidenced by certificates of deposit, the *res* would still be in Florida, at the Jasper Bank, being the indebtedness of it to the respondent here. A debt has often been held to be a *res*, such as will support an action *in rem* against it, and its situs for the purpose of administration, is considered to be at the home of the debtor. In the present case, the debtor, Jasper Bank, being within the jurisdiction of the State Court, the debt, the *res*, was also in the jurisdiction.

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I & P. R. Co. vs. Sturm, 174 U. S. 810; 43 L. ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the

same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process, and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, it cannot be contended that in the suits in the State Courts, there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida, the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent, or anyone for it.

The holding in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

A very similar case to the case at bar is that of Pennington v. Fourth National Bank, 243 U. S. 269-273; 61 L. Ed. 713, (decided March 6, 1917). In said case Mrs. Pennington brought a suit for divorce, in a State court of Ohio, against her husband, who was a non-resident of Ohio, who was served with process by publication only, and had not voluntarily appeared in the suit. She obtained a valid decree

of divorce. In the same proceeding she sought alimony; and in order to insure its payment joined as a defendant the Fourth National Bank of Cincinnati, in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the Bank from paying out any part of the deposit. Under later orders of the Court, the Bank made payment from it to the wife. Finally it was perpetually enjoined from making any payments to the husband and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the 14th Amendment. Payment of the check was refused. Thereupon, Pennington brought in another State court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the Court of Appeals for Hamilton County, and from there to the Supreme Court of Ohio. Both these courts affirmed the judgment below. Then the case was taken to the Supreme Court of the United States for review, Pennington still claiming that his constitutional rights had been violated.

In the above case and the case at bar service by publication was had on the non-resident defendants. In both cases a resident bank, holding the funds of a non-resident defendant, was made a defendant and personally served with process. In both cases the defendant bank was enjoined from paying the

money to the defendant in whose name the funds were deposited, and was ordered to pay said deposit to the plaintiff. In both cases the deposit in the resident bank, defendant, the debt due the non-resident defendant, was the res adjudicated by the State court. Said deposit was property within the State and in the jurisdiction of the State Court. In both cases the situs of the debt or res is the residence of the defendant, the resident bank. In both cases personal property was involved. In both cases the original suit was by bill in chancery in which the State court entered final decree, in which the resident bank defendant was enjoined from paying the money to the non-resident defendant in whose name the funds were deposited, and was ordered to pay said deposit to plaintiff. Thereafter in both cases, the original non-resident defendant, brought an independent action in another court against the original resident bank, defendant, for the amount of the deposit. Finally, in both cases the entire matter was taken to the Supreme Court of the United States for review.

In the above case, Pennington vs. Fourth Nat. Bank, 243 U. S. 269-273, 61 L. Ed. 713, at page 714, in its opinion the court says:

> "The 14th Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an ex-

ample is property within the state. Chicago R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. cases 1084. Substituted service on a non-resident by publication furnishes no legal basis for a judgment in personam. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. Freeman v. Alderson, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

"It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that

the claim is, at the commencement of the suit, in choate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt, that is, it will be valid not in personam, but as a charge to be satisfied out of any property seized. Cases are cited in the margin.

"The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which can not be attached at law. Cases are cited in the margin.

"Affirmed."

In accordance with the above opinion we maintain that defendant's (petitioner here) seven additional pleas, with exhibits attached (Transcript, pp. 9 to 18 and pp. 18 to 42) to first five counts of plaintiff's (respondent here) declaration (Transcript, pp. 3 to 9) are a complete defense to respondent's cause of action.

We wish to call the attention of this Court to the decision of the Florida Supreme Court in the case

of Rome Ins. Co. vs. Corbett, 63 So. 833 (Transcript, pp. 82 and 83). In that case the same points are involved as are presented by the writ of error to the United States Circuit Court of Appeals. In fact said writ of error amounts in effect to an appeal from the Supreme Court of Florida to said Circuit Court of Appeals, for it is the decision in Rome Ins. Co. vs. Corbett, of which the respondent here really complains. The Court there said:

> "A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-resident corporations, seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute, was had by publication, and the non-resident corporation appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

and,

> "The bill *confines its prayer to an adjudication of the fund sought to be impounded*, and does not pray for a general personal decree against these non-residents, and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs. Neff, 95 U. S. 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived, to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts, and as has been said in Kilpatrick v. Post, 53 N. J. Eq. 591, 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says, 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The order is affirmed." (Italics ours).

The foregoing decision was an adjudication by the Florida Supreme Court that the court, in the proceedings set up in the additional pleas herein, had jurisdiction in the premises. Therefore, under

the rule as laid down in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, this Court should give "full faith and credit" to the decree.

The theory on which the respondent attacks the validity of the decree set up in the plea in question, is fallacious and unsound, unsupported by reason, justice or authority. This theory is, that according to one of the twelve maxims, equity acts in personam; that the decree set up in the plea is a chancery decree; that, therefore, it must be a personal decree and consequently void for want of personal service. Counsel for respondent contends that in the absence of the statute, equity can only act *in personam* and that no statute in Florida exists authorizing the decree under consideration.

The major premise of respondent's syllogism, viz, that equity acts only in personam, is unsound and its conclusion must necessarily fall with it.

The many cases already cited in this brief in themselves constitute an unanswerable refutation of this theory. They show that equity does act *in rem* in so far as is necessary to justify service by publication. The maxim, "Equity acts only *in personam*, and not *in rem*," is not to be taken too literally. It was a statement made at the time when Chancery jurisdiction was first exercised to allay the jealousy of the common law courts, which feared the usurpation of their powers by the Chancellors. The maxim stated that equity would act *in personam*, on the consciences of the parties, and thus perform a duty impossible for the courts of law to fulfill. However, it was seen, from the necessities of the case, that

equity could not act entirely *in personam,* and although the maxim was retained, and still applies, in a limited sense, yet equity decrees are in a large part, *in rem* and not *in personam.* This is pointed out by all the recognized authorities on equity jurisprudence.

We quote from Vol. 1, Pomeroy's Equity Jurisprudence, (3rd Ed.) Sec. 134-135, as follows:

> "Some writers have argued that the equitable jurisdiction is to be regarded as wholly remedial, and that equity itself does not create any rights of property or other primary rights, because the Courts of Chancery, as they say, only act in personam against the parties and never in rem upon the subject matter of a judicial controversy. It is said that a decree of the court never operates by virtue of its own inherent efficacy to create or to transfer an estate, right or interest; that such decree never executes itself nor furnishes any means or instrument by which it may be executed without the intervention or act of the party against whom it is rendered; that the plaintiff in equity never merely by means of the decree in his favor ever recovers possession of the land or *other subject matter,* or becomes invested with the title to or estate therein; and that the court simply orders some act to be done, a conveyance to be executed, an instrument to be surrendered up and cancelled, possession to be delivered and the like, and then merely uses a moral coercion upon the defendant by means of fine and imprisonment to compel *him* to do what is asked to be done in the judgment. This radical difference between the effect of the de-

> cree in equity and a judgment at law, it is urged, shows that there are no equitable primary rights, no equitable estates or interests distinct and separate from the rights to obtain such remedies as are administered by the Court of Chancery."

After giving the views of some writers in the language above quoted, the same author (Pomeroy) comments on the view as follows:

> "There may be some plausibility in this argument on its surface, but when it is examined with care and under the light of history, all its force disappears. The early Chancellors from prudential motives alone and to avoid a direct conflict with the common law courts, adopted this method of acting, as they said upon the consciences of defendants; and the practice which they invented has with the English national devotion to established forms, continued to modern times. *But it is certainly a complete confounding of the essential facts with the external form to say that such a method of procedure, adopted solely from considerations of policy, determines the nature of the equity jurisdiction and demonstrates the non-existence of any equitable primary rights, estates and interests.* (Italics ours). If there has been any *necessary* connection between the proceedings and remedies of the Chancery and this mode of enforcing its decrees in personam, if it had been intrinsically impossible to render these decrees operative in rem, then the argument would have had some weight but in fact there is no such connection, no such impossibility, and the decrees of the court of equity may be made to

operate in rem to the same extent and in the same manner as judgments at law."

Up to this point in the statement of the law by Mr. Pomeroy, no reference is made to any statutory enlargement of equity jurisdiction. However, he follows the statement just quoted with the further statement, as follows:

"Furthermore, whatever of plausibility there might be in the theory as applied to the English Court of Chancery has been entirely destroyed by the legislation of this Country. The statutes of the several states have virtually abolished the ancient doctrine that the decrees in equity can only act upon the persona of a party, etc."

It is clear, however, from Mr. Pomeroy's exposition as above quoted, that regardless of any statutory enlargement of equity jurisdiction, equity does in fact act *in rem*, as well as *in personam*.

We quote again from Section 429, page 710, Volume 1 Pomeroy, as follows:

"*In what sense equitable remedies do operate in rem:* It has also been shown when explaining the nature of equitable remedies that they generally are in another special sense essentially in rem and not in personam. Equitable remedies very seldom consist of personal judgments, general recoveries payable out of defendant's assets. The fundamental theory of the remedial action of equity is, that it deals with specific and identified land or *chattels* or *specific funds*, whether consisting of securities

and other things in action or of money and it seeks to determine, declare and maintain the estates, interests and rights of the litigant parties in and to such identified lands, chattels, or funds."

In the third edition by the same author in Volume 1, at page 196, it is stated:

"The maxim referred to (that equity acts only in personam) has therefore a very limited application. When we turn from this mere external manner in which equitable remedies were enforced according to the original chancery procedure to the essential, and so to speak, internal nature and qualities of the remedies themselves, instead of their being merely personal, it is one of the distinct and central principles of the equity remedial system that it deals with property rights—estates, interests, liens,—rather than with mere personal rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of property, in their various grades, from complete estates to liens or charges is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence,—things to be acquired in the future—the remedial right is worked out by conceiving of a present ownership, interest, lien or charge arising from the executory provisions or a present possibility which will ripen into such an interest, and by establishing this proprietory right, protecting and enforcing it."

And continuing on in the same section, the author clearly demonstrates that equity in a peculiar way deals with rights or interests in property and shapes its relief accordingly without much regard to the personal rights of the plaintiff and the personal obligations of the defendant—or rather by passing over them in its decree.

In Bispham on Equity, the author, after setting forth the maxim that equity acts *in personam*, points out the limitations on its application, and expressly states that equity acts *in rem* where the *res* is in the jurisdiction of the court although the defendant is a non-resident and personal service on him is impossible. At page 75 it is said:

> "The maxim that a court of equity acts in personam must not be understood to mean that the jurisdiction of the chancellor extends to rights of action for personal injuries. The reverse is the case. The subject of the jurisdiction of courts of equity is *property*—not *persons*. Their process is directed against persons and sometimes against property; but there must be some right of property involved in order that the jurisdiction of the court may attach. This subject will be noticed hereafter; but reference may be made in this connection, to the refusal of courts of chancery to entertain any bill to recover damages for purely personal torts.
>
> "It may not be out of place, moreover, to mention here the rule applicable when the res happens to be within the jurisdiction, and the person whose rights in the res are sought to be affected by the decree is a non-resident. In such cases, at all events for certain purposes,

the court will exercise jurisdiction over the thing although personal service upon the defendant may not be possible—whenever service by publication, in lieu of personal service, is authorized by statute. Cases not infrequently arise where it is necessary that the title to real estate should be perfected by getting rid of an outstanding claim. The title to land may be clouded by the existence of an alleged right which the holder declines, presently, to assert. There is, as we shall see hereafter, a jurisdiction in courts of chancery to remove a 'cloud' upon the title. This power may be exercised if the land is within the process of the court, although the party affected may be beyond its limits."

The theory advanced by counsel for plaintiff (respondent here), that equity can act only *in personam;* that consequently it cannot enter a decree *in rem* which can be based on service by publication, is not original. It has many times, in similar cases been offered to the Courts, but in each instance it has met with a cold reception. In Amparo Mining Co. vs. Fid. Trust Co. (N. J.) 71 At. 605, heretofore quoted, the court disposed of the theory as follows:

"In the present case the res is personal property. It does not follow that because anciently an equity decree affecting real estate operated only in personam, and did not proprio vigore transfer or establish title, that such decrees affecting personal property within the jurisdiction of the court were in the same way limited in their practical operation. Assuming that formerly in neither case did the decree

establish title but only the right of the complainant to receive a title, the important distinction still remains that in the case of real estate title did not pass upon delivery of possession, whereas in the case of chattel property it did. Anciently the Court of Chancery would not give to a successful complainant, in a suit for specific performance of a contract to convey real estate, a writ of assistance to put him in possession, because no legal title would be thereby established. The same difficulty does not exist in the case of chattels. The argument to sustain the plea in this case seems to assume that a party complainant, who has obtained a final decree in this court establishing his equitable title to chattels in possession of a defendant holding legal title thereto, and who in pursuance of such decree has actually obtained possession, has no legal title, and will have none until the defendant has voluntarily, or under the compulsion of the court, executed a conveyance. The general principle, I think is now recognized that a bare legal title to chattels cease to exist when the holder of a complete equitable title takes possession for the reason that such possession creates a legal title. Kronson v. Lipschitz, 68 N. J. Eq. 367, 60 Atl. 819 (1904). Such certainly must be the effect of the union of a complete equitable title and possession, when the only right or duty in respect of the chattels remaining in the original holder of the legal title is to convey the same to the holder of the equitable title. Possession of a chattel under a complete equitable title in such a case must make a complete legal title."

There can be no question of the jurisdiction of

courts of Chancery over proceedings such as are disclosed in the pleas under consideration. The cases cited herein where similar decrees have been entered and upheld, amply substantiate this proposition. Equity having jurisdiction as the authorities all show, to declare the trust and adjudicate the title to the funds involved, the State had the power to provide for substituted service against non-residents by publication. The Florida Statute concerning service by publication (Gen. Stat. 1866) (Rev. Gen. Stat. 3111; year 1920) is unlimited. It provides for service by publication in all chancery cases. On page 82 of the transcript we see that the Florida Supreme Court in Rome Insurance Co. vs. Corbett, 63 So. 833, construed this, its own statute, as follows:

> "Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts."

It is not material to quote the entire section here, as it deals with the mechanism of obtaining service by publication. It commences:

> "Whenever the complainant, his agent or attorney, shall state in a sworn bill or affidavit, duly filed, the belief of the affiant that the defendant is a resident of a state or country other than this state —"

and continues to describe the process of mailing, posting, publishing, etc. The word "whenever" is the only limitation on the operation of the section, and as we have seen, the Florida Supreme Court has held it broad enough to cover any equity action.

So has the United States Circuit Court for the Southern District of Florida. In Morris vs. Graham, 51 Fed. 53, the court said:

> "The general principle of equity gives to the courts of this state powers to investigate questions of cloud of title, with power to quiet the title to lands involved and to remove therefrom alleged liens, and no special statute was required for that purpose. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495. The state has by statute authorized and provided for publication and service to carry into effect the rights before existing in a court of chancery."

So in this case. The courts of equity have power to investigate fraud, establish and enforce trusts, without any special statutory enactment for that purpose. The State, by its constructive service statute (Gen. Stat. 1866 supra) (Rev. Gen. Stat. 3111; year 1920) has authorized service by publication to carry into effect the rights and powers of its Chancery courts.

The Supreme Court of the United States has passed upon this contention in Arndt vs. Griggs, 134 U. S. 316, 33 L. ed. 918, which concerned the powers of a Chancery Court to clear title to land within its jurisdiction when the defendant was a non-resident served by publication. It was held that the State has control over the property within its borders and could provide, as by service by publication, reasonable methods of imparting notice to non-residents. The Court said:

> "The propositions are, that an action to

quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.

"While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute might do, but it is, What jurisdiction has a State over to titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may

provide any reasonable methods of imparting notice."

To the same effect is Grannis vs. Ordean, 234 U. S. 385, 58 L. ed. 1363.

In these two cases the property concerned was real estate, but the reasoning of the opinions applies equally well to personal property. The State has undoubted jurisdiction over property within its borders. Its courts of equity have equally undoubted jurisdiction to establish and enforce trusts and to relieve from fraud. Therefore a decree establishing and enforcing a trust resulting because of a fraud, in personal property within its jurisdiction is valid even though non-residents claim title to such property, if, as in this case, proper notice by publication is given, as provided by statute. Every authority and every case cited in this brief refutes the theories of counsel for plaintiff and shows beyond question that the decree set up in the plea under consideration is valid.

In Rothschild vs. Knight, 184 U. S. 341, 46 L. ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King vs. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. ed. 213, which held:

"A garnishment of a resident debtor to reach a debt due to a non-resident defendant *who has no property subject to the jurisdiction*

> *of the Court*, does not deprive him of property without due process of law." (Italics ours).

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript p. 121):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Forida. They, in themselves constituted the *res*. But in addition there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript p. 124), the certificates of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness, which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to the respondent. This is essentially the theory of garnishment. The situs of the debt being

at the home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but they partake of all the characteristics of, and are really, actions *in rem*.

Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 565.

Freeman vs. Alderson, 119 U. S. 185, 30 L. ed. 375.

1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D—THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 9 to 18). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 120 to 122); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 122 to 124).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeal's decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the question of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only power was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo.*

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam,* and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript p. 42) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote vs. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance and is not a compliance with the statute requiring the substantial matters of law to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 45 to 98) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it is said:

> "Only objections or grounds of objection urged in the trial court will be considered on

appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented,* were correct or not." (Italics ours).

In the case of Belk vs. Meagher, 104 U. S. 279, 26 L. ed. 735-739, at page 739, the Court said:

> "Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it."

As this Court said in Robinson & Co. vs. Belt, 187 U. S. 41, 47 L. ed. 65:

> "*While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to try these cases de novo.*"

An examination of the transcript of the record in the cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect, as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

In the case of Wood vs. Weimar, 104 U. S. 786, 26 L. ed. 779-782, at page 782, the court said:

> "The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly."

In the case of Bort vs. E. H. McCutchen & Co., 187 F. 798, 109 C. C. A. 558, decided by the United States Circuit Court of Appeals for the Eighth Circuit, the court in effect holds:

> "A writ of error presents for review nothing but the alleged errors of law into which the court below has fallen, and a contention which was never presented to nor ruled upon by that court is not before the appellate court for consideration or decision."

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 18 to 42) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees. It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees if valid, and only asked that Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds—in other words the amounts of the certificates to the First National Bank of Rome, *or to anyone for it*, (Transcript, pp. 18 to 42). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect*. Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument—on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript, p. 123). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudge the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts

represented by the certificates consisted of the proceeds of the note, and if a part of the amount consisted of other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript, pp. 9 to 18) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript, pp. 45 to 98) do not say that the certificates only partially cover the proceeds of the note. They are concerned only with the jurisdiction of the Court in entering decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could, therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We believe that it has been clearly demonstrated that the Circuit Court of Appeals erred in its decision of this case, and that the decree of the District Court was proper, the latter being in consonance with the decision of the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were

proceedings *in rem* and jurisdiction over the person of the non-resident defendant was not necessary.

2. The prosecution of an appeal under the Florida practice constitutes a general appearance.

3. The State Court had jurisdiction over the person of the respondent by reason of its voluntarily availing itself of the State Court's jurisdiction to prosecute appeals therein.

4. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

5. The effect of the State Court's decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

We submit that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed; and that the judgment of the United States District Court for the Southern District of Florida should be sustained.

Respectfully submitted,

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